

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YAKIMA VALLEY MEMORIAL
HOSPITAL, a Washington
Nonprofit Corporation,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT
OF HEALTH and MARY C.
SELECKY, in her official
capacity as Secretary of the
Washington State Department
of Health,

Defendants.

NO. CV-09-3032-EFS

**ORDER DENYING YAKIMA CARDIAC
CENTER'S MOTION TO INTERVENE
AS DEFENDANT**

Before the Court, without oral argument, is Proposed-Intervener Yakima HMA, LLC, doing business as Yakima Regional Medical and Cardiac Center's ("YCC"), Motion to Intervene As Defendant, ECF No. 80. After reviewing the record in this matter, the filings of the parties, and applicable authority, the Court is fully informed. For the reasons stated below, the Court denies YCC's motion.

I. BACKGROUND

Yakima Valley Memorial Hospital (YVMH) filed its complaint in this matter on March 20, 2009. ECF No. 1. YVMH's Complaint asserts that the Washington State Department of Health's (DOH) certificate of need (CON)

1 regulations for elective percutaneous coronary intervention (PCI)
2 procedures, codified at WAC 246-310 *et seq.*, violate the Sherman Act, 15
3 U.S.C. § 1, and violate the Dormant Commerce Clause of Article 1, § 8,
4 cl. 3 of the United States Constitution. On August 31, 2009, Defendants
5 moved for judgment on the pleadings, arguing that YVMH's complaint fails
6 to state a claim upon which relief could be granted. ECF No. [31](#). On May
7 25, 2010, the Court granted Defendants' motion and entered judgment in
8 their favor. ECF Nos. [58](#) & [59](#). Plaintiffs appealed the Court's decision
9 to the Ninth Circuit Court of Appeals. ECF No. [60](#).

10 The Ninth Circuit affirmed the Court's dismissal of YVMH's Sherman
11 Act claims, holding that the PCI regulations are a unilateral licensing
12 requirement and not an agreement in restraint of trade. ECF No. [73](#).
13 With regard to YVMH's Dormant Commerce Clause claim, the Ninth Circuit
14 upheld the Court's ruling that YVMH has standing to challenge the PCI
15 regulations, but reversed the Court's ruling that Congress had authorized
16 CON programs in the National Health Planning and Resources Development
17 Act of 1974. *Id.* On September 12, 2011, the Ninth Circuit remanded the
18 case to this Court for further proceedings on YVMH's Dormant Commerce
19 Clause claim. ECF No. [75](#).

20 YCC filed the instant Motion to Intervene as Defendant on October
21 26, 2011. ECF No. [80](#). YVMH opposes YCC's motion, ECF No. [86](#), while
22 Defendants support YCC's motion, ECF No. [84](#). YCC asserts that it may
23 intervene as of right per Federal Rule of Civil Procedure 24(a) or,
24 alternatively, that it should be permitted to intervene permissively per
25 Rule 24(b).

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1 **II. INTERVENTION AS OF RIGHT**

2 Under Federal Rule of Civil Procedure 24(a), upon timely motion, the
 3 Court must permit any party to intervene if the party "claims an interest
 4 relating to the property or transaction that is the subject of the
 5 action, and is so situated that disposing of the action may as a
 6 practical matter impair or impede the movant's ability to protect its
 7 interest, unless existing parties adequately represent that interest."
 8 Fed. R. Civ. P. 24(a)(2). The Ninth Circuit has parsed the language of
 9 Rule 24(a) into four distinct requirements: 1) timeliness; 2) a
 10 "significant protectable interest" in the subject of the action; 3) which
 11 may be impaired or impeded if the action is disposed of without the
 12 applicant's participation; and 4) which interest is not adequately
 13 represented by the existing parties. *Citizens for Balanced Use v. Mont.*
 14 *Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing *Prete v.*
 15 *Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)).

16 **A. Timeliness**

17 "Timeliness is the threshold requirement for intervention as of
 18 right." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297,
 19 1302 (9th Cir. 1997). The Ninth Circuit considers three criteria in
 20 determining whether a motion to intervene is timely: 1) the stage of the
 21 proceedings; 2) whether the parties would be prejudiced; and 3) the
 22 reason for any delay in moving to intervene. *Nw. Forest Res. Council v.*
 23 *Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996) (citing *United States v.*
 24 *Oregon*, 913 F.2d 576, 588 (9th Cir. 1990)). Here, YCC moved to intervene
 25 on October 26, 2011, over thirty-one months after YMVH filed its
 26 Complaint, and thirty months after Defendants filed their Answer. In the

1 interim since YVMH filed its Complaint, the Court considered and granted
2 Defendants' Motion for Judgment on the Pleadings, YVMH appealed the
3 matter to the Ninth Circuit, and the case was remanded back to this
4 Court. YCC argues that it is seeking intervention "at the first stage
5 of the action on remand," ECF No. 82 at 6, but this is actually a
6 relatively late stage in the proceeding; the parties have engaged in
7 active motions practice, have completed over twelve months of discovery,¹
8 and have completed a "round trip" appeal to the Ninth Circuit. See *League*
9 *of United Latin Am. Citizens*, 131 F.3d at 1304 (denying intervention to
10 applicant who had been "aware of this litigation since it was filed" but
11 waited twenty-seven months after the filing of the complaint to seek
12 intervention). Though this case has only recently been remanded, it is
13 not in an early stage, and this factor weighs against intervention.

14 YVMH has not raised the issue of prejudice in their moving papers,
15 but the Court finds that allowing YCC to intervene at this stage of the
16 proceedings would prejudice the existing parties by forcing them to incur
17 additional discovery-related expenses and by requiring them to address
18
19

20 ¹ YCC makes much of Plaintiff's counsel's statements during oral
21 argument before the Ninth Circuit that "there's been no discovery" and
22 that the Dormant Commerce Clause claim was "undeveloped." See ECF No.
23 87 at 4-5. However, given that this statement was made over nine months
24 ago, and that the parties have in fact engaged in discovery in this
25 matter, see ECF Nos. 93 & 94, the Court rejects this estoppel-based
26 argument.

1 the affirmative defenses raised in YCC's Proposed Answer, ECF No. 80-[1](#)
 2 at 5. This factor also weighs against intervention.

3 With regard to the reason for delay, YCC attempts to explain its
 4 delay in requesting leave to intervene on the basis that it "did not
 5 intervene in the antitrust case, as the allegations were obviously
 6 without merit." ECF No. [87](#) at 6. While "the mere lapse of time, without
 7 more, is not necessarily a bar to intervention" and "a party's interest
 8 in a specific phase of a proceeding may support intervention at that
 9 particular stage of the lawsuit," *United States v. Alisal Water Corp.*,
 10 370 F.3d 915, 921 (9th Cir. 2004), YCC has not demonstrated a particular
 11 interest in this specific stage of the lawsuit. Rather, the issue before
 12 the Court on remand is the exact same issue presented in YVMH's
 13 Complaint, and YCC's "without merit" argument is not a legitimate reason
 14 for delay. See *League of United Latin Am. Citizens*, 131 F.3d at 1308
 15 (denying intervention to applicant that "slept on its intervention rights
 16 for more than two years" because "[w]hen it awoke, it was unable
 17 convincingly to explain its delay"). Accordingly, the Court finds that
 18 YCC's proffered explanation for delay does not excuse its failure to
 19 apply for leave to intervene during the past thirty-one months.

20 Because all three timeliness factors weigh against intervention, the
 21 Court denies YCC's motion to intervene as untimely. However, in support
 22 of its decision to deny YCC's motion, the Court addresses the other Rule
 23 24(a) factors below.

24 **B. YCC's Interest in the Subject of This Action**

25 In addition to filing a timely motion to intervene, a party seeking
 26 intervention under Rule 24(a) must also show that it has a significant,

1 protectable interest in the subject of the action, and that the interest
2 may be impaired or impeded if the action is disposed of without its
3 participation. "The requirement of a significantly protectable interest
4 in generally satisfied when the interest is protectable under some law,
5 and there is a relationship between the legally protected interest and
6 the claims at issue." *City of Emeryville v. Robinson*, 621 F.3d 1251,
7 1259 (9th Cir. 2010) (internal citation omitted). "A party has
8 sufficient interest for intervention purposes if it will suffer a
9 practical impairment of its interests as a result of the pending
10 litigation." *Id.* (internal citation omitted). Here, YCC's status as the
11 only hospital in the Yakima Valley that is currently authorized to
12 perform elective PCI procedures gives it a significant and protectable
13 interest in the outcome of this litigation. Furthermore, while YCC's
14 ability to perform elective PCI procedures is not contingent upon the
15 validity of the DOH's CON regulations, disposal of this matter without
16 YCC's participation would, in a practical sense, impair YCC's interest
17 because it would lose its monopoly over elective PCI procedures in the
18 Yakima Valley. The Court thus considers whether YCC's interest is
19 adequately protected by the existing parties.

20 **C. Adequacy of Representation**

21 In evaluating whether an existing party adequately represents a
22 proposed intervenor's interests, the Ninth Circuit considers the
23 following three factors: "1) whether the interest of a present party is
24 such that it will undoubtedly make all of a proposed intervenor's
25 arguments; 2) whether the present party is capable and willing to make
26 such arguments; and 3) whether a proposed intervenor would offer any

1 necessary elements to the proceeding that other parties would neglect.”
2 *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citing
3 *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir.
4 1986)). If an applicant for intervention and an existing party share the
5 same ultimate objective, a presumption of adequacy of representation
6 arises, which must be rebutted with a “compelling showing” of inadequacy
7 of representation. *Citizens for Balanced Use*, 647 F.3d at 898. “There
8 is also an assumption of adequacy when the government is acting on behalf
9 of a constituency that it represents, which must be rebutted with a
10 compelling showing.” *Id.* (internal citation omitted).

11 Here, both YCC and Defendants argue that because “[t]he State’s
12 purpose is to defend the broad public interest and preserve the elective
13 PCI regulations . . . it does not have an economic interest in the
14 specific PCI procedures at issue or [YCC]’s revenue sources.” ECF No.
15 82 at 8; see also ECF No. 84 at 3 (“[T]he Department construes and
16 implements the [CON] law consistent with the public interest and with the
17 legislature’s directives in Wash. Rev. Code 70.38 . . . [i]n so doing,
18 the Department certainly does not represent the interest of [YCC] or any
19 other private party.”). Notwithstanding their divergent motivations for
20 doing so, however, both Defendants and YCC clearly share the same
21 ultimate objective: preserving the continuing validity of the state’s CON
22 regulations. And it is undisputed that Defendant DOH is a government
23 agency acting on behalf of its constituency. A presumption of adequacy
24 of representation thus arises, and the Court finds that YCC has not
25 overcome this presumption with the “compelling showing” required by case
26 law. Accordingly, YCC’s motion must be denied both as untimely and
because Defendants adequately represent its interest.

1 III. PERMISSIVE INTERVENTION

2 YCC also seeks leave to intervene under Rule 24(b), which states in
3 pertinent part that “[o]n timely motion, the court may permit anyone to
4 intervene” if that person “has a claim or defense that shares with the
5 main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1),
6 (b)(1)(B). In exercising its discretion regarding whether to allow a
7 party to intervene under Rule 24(b), “the [C]ourt must consider whether
8 the intervention will unduly delay or prejudice the adjudication of the
9 original parties’ rights.” *Id.* at 24(b)(3). “As with motions for
10 intervention as of right, a finding of untimeliness defeats a motion for
11 permissive intervention.” *League of United Latin Am. Citizens*, 131 F.3d
12 at 1308 (internal citation omitted).

13 In determining timeliness under Rule 24(b), the Ninth Circuit
14 considers the same three factors that it does under Rule 24(a)(2): the
15 stage of the proceedings, the prejudice to the existing parties, and the
16 length of and reason for the delay. *Id.* In the context of permissive
17 intervention, however, the Ninth Circuit analyzes the timeliness element
18 more strictly than it does with intervention as of right. *Id.* (citing
19 *Oregon*, 745 F.2d at 552).

20 For the reasons stated above, the Court finds that YCC’s motion is
21 untimely under the standard applied to intervention as of right under
22 Rule 24(a). It thus follows *a fortiori* that YCC’s motion is untimely
23 under the stricter standard applied to permissive intervention under Rule
24(b). See *League of United Latin Am. Citizens*, 131 F.3d at 1308
25 (holding that finding of untimeliness in Rule 24(a) analysis was
26 “controlling” in Rule 24(b) timeliness analysis). Accordingly, YCC’s
motion is denied in this regard as well.

IV. CONCLUSION

For the reasons discussed above, the Court denies YCC's motion to intervene as of right as untimely and because Defendant DOH adequately represents YCC interests in this litigation. The Court also denies YCC's motion for permissive intervention as untimely.

Accordingly, **IT IS HEREBY ORDERED:** YCC's Motion to Intervene As Defendant, **ECF No. 80**, is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to counsel.

DATED this 20th day of December 2011.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge